



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC**

Issued by the Department of Transportation on October 25, 2004

**NOTICE OF ACTION TAKEN -- DOCKET OST-2004-18932
AMENDED AUTHORITY**

This serves as notice to the public of the action described below, taken by the Department official indicated (no additional confirming order will be issued in this matter).

Joint Application of **US Airways, Inc.¹ and British Midland Airways Limited d/b/a bmi** filed **8/19/04** for:

XX Exemption for US Airways under 49 U.S.C. 40109 to provide the following service:

Scheduled foreign air transportation of persons, property, and mail between any point or points in the United States, and regional airports in the United Kingdom directly and via intermediate points, and beyond the United Kingdom to any point or points in third countries, and to integrate this authority with US Airways' existing certificate and exemption authority. US Airways further requests any necessary exemption authority (including the right to integrate such authority with its existing certificates and exemptions) in order to engage in code-sharing arrangements with bmi.

XX Exemption for bmi under 49 U.S.C. 40109 to provide the following service:

Scheduled foreign air transportation of persons, property, and mail between (1) regional airports in the United Kingdom and any point or points in the United States, via bmi's authorized U.S. gateways, and (2) Philadelphia and Charlotte, on the one hand, and London (Gatwick) on the other, for purposes of operating under its code share agreement with US Airways, whereby bmi will place its code on flights operated by US Airways. bmi further requests any necessary exemption authority in order to engage in code-sharing arrangements with US Airways.

XX Statement of authorization for US Airways under CFR Part 212 to:

Permit US Airways to display the "BD" code of bmi on flights operated by US Airways between (1) points in the United States and regional airports in the United Kingdom, either nonstop or via third-country intermediate points; (2) points in the United States; and (3) Philadelphia, PA; and Charlotte, NC; on the one hand, and London (Gatwick) on the other.²

XX Statement of authorization for bmi under 14 CFR Part 212 to:

Permit bmi to display the "US" code of US Airways on flights operated by bmi between (1) points in the United States and regional airports in the United Kingdom, either nonstop or via third-country intermediate points; (2) points in the United Kingdom; and (3) points in the United Kingdom and points in third countries beyond the United Kingdom, either nonstop or via third-country intermediate points.³

Applicant reps: **Howard Kass (703) 872-5230 (US Airways), Marshall Sinick (202) 626-6651 (bmi)**
DOT Analyst: **Sylvia Moore (202) 366-6519**

¹ US Airways also applied on behalf of its affiliated carriers, Piedmont Airlines, Inc.; and PSA Airlines.

² See Attachment A for the Routes US Airways and bmi initially propose to serve.

³ *Id.*

By Notice of Action Taken dated October 1, 2004, in the above captioned docket, the Department granted the joint applicants' request, in part, subject to conditions, but deferred action on the joint applicants' request for authority to serve Aberdeen and Leeds Bradford, U.K. and Toulouse, France, and to code-share to and from London (Gatwick).

We are now approving the deferred portions of this joint application. With respect to Aberdeen, Leeds Bradford, and Toulouse, we have received necessary security clearances. With respect to London (Gatwick) code-share authority, as we noted in our October 1 Notice, Continental filed an objection to that portion of the joint application, stating that such an award would be extrabilateral and that the aviation relationship between the United States and the United Kingdom does not support the grant of that portion of the applicants' request. However, the U.S.-U.K. agreement provides that designated U.S. and U.K. carriers may code share on routes where they have the authority to exercise traffic rights. In this case, bmi has been designated and licensed by U.K. authorities for the gateway route segments between London (Gatwick) and Charlotte and Philadelphia. Thus, bmi is entitled to exercise the necessary traffic rights and, therefore, is eligible under the agreement to code share on those routes.

Although the U.S.-U.K. agreement does preclude code-sharing arrangements between airlines that are designated on and serving the same gateway route segment, that prohibition does not apply in this case since bmi is not serving the routes with its own aircraft and crew.

As amended, our actions grant the applicants the following authority:

bmi

Scheduled foreign air transportation of persons, property, and mail between:

- (1) regional airports in the United Kingdom and any point or points in the United States;
- (2) London (Gatwick), on the one hand, and Philadelphia and Charlotte, on the other, and beyond to any point or points in the United States; and
- (3) any point or points in the United States and any point or points in third countries

for purposes of operating under its code share-agreement with US Airways, whereby bmi will place its code on flights operated by US Airways.

US Airways

Scheduled foreign air transportation of persons, property, and mail between any point or points in the United States and regional airports in the United Kingdom directly and via intermediate points, and beyond the United Kingdom to any point or points in third countries, and to integrate this authority with US Airways' existing certificate and exemption authority, in order to engage in code-sharing arrangements with bmi.

DISPOSITION

XX Granted remainder of applicants' requests (subject to conditions, see below)

The above action with respect to the applicants' exemption authority was effective when taken: **October 25, 2004**, through **October 1, 2006** (coextensive with the authority granted on October 1, 2004, in this Docket).

The additional authority awarded by the statements of authorization granted was effective when taken: **October 25, 2004**, and will remain in effect indefinitely, subject to the conditions listed below.

Action taken by: Paul L. Gretch, Director
Office of International Aviation

XX The authority granted is consistent with the aviation agreement between the United States and the United Kingdom.

Except to the extent exempted or waived, this authority is subject to the terms, conditions, and limitations indicated:

XX US Airways' certificates of public convenience and necessity

XX Standard exemption conditions (Attachments B and C)

Conditions: The route integration authority granted is subject to the condition that any service provided under this exemption shall be consistent with all applicable agreements between the United States and the foreign countries involved. Furthermore, (a) nothing in the award of the route integration authority requested should be construed as conferring upon US Airways rights (including fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless US Airways notifies the Department of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any carrier to use the limited-entry route rights that are included in US Airways' authority by virtue of the route integration exemption granted here, but that are not then being used by US Airways, the holding of such authority by route integration will not be considered as providing any preference for US Airways in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

The authority granted to serve intermediate and beyond points is limited to countries with which the United States has signed open-skies agreements and/or countries for which the carrier holds authority to serve under certificates or exemptions issued by the Department, and for which it holds route integration authority by virtue of either the present action or other action of the Department.

The statements of authorization granted are subject to the following conditions:

- (a) The statements of authorization will remain in effect only as long as (i) US Airways and bmi continue to hold the necessary underlying authority to operate the code-share services at issue, and (ii) the code-share agreement providing for the code-share operations remains in effect.
- (b) US Airways and/or bmi must promptly notify the Department (Office of International Aviation) if the code-share agreement providing for the code-share operations is no longer effective or if the carriers decide to cease operating all or a portion of the approved code-share services. Such notices should be filed in Docket OST-20043-18932.⁴
- (c) US Airways and/or bmi must notify the Department no later than 30 days before they begin any new code-share service under the code-share services authorized here. Such notice shall identify the market(s) to be served, which carrier will be operating the aircraft in the code-share market added, and the date on which the service will begin. (Such notice should be filed in this Docket.)
- (d) The code-sharing conducted under this authority must comply with Part 257 and with any amendments to the Department's regulations concerning code-share arrangements that may be adopted. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in the computer reservation systems and elsewhere; that the carrier selling such transportation (*i.e.*, the carrier shown on the ticket) accept responsibility for the entirety of the code-share journey for all obligations established in its contract of carriage with the passenger; and that the passenger liability of the operating carrier be unaffected. Further, the operating carrier shall not permit the code of its U.S. air carrier code-sharing partner to be carried on any flights that enter, depart, or transit the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition.
- (e) The authority to operate to third countries is subject to the condition that any service provided under the statement of authorization shall be consistent with all applicable agreements between the United States and the foreign countries involved. Furthermore, (i) nothing in the award of this blanket statement of authorization should be construed as conferring upon US Airways rights (including code-share, fifth freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless US Airways notifies the Department of its intent to

⁴ We expect this notification to be received within 10 days of such non-effectiveness or of such decision.

serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights;⁵ and (ii) should there be a request by any carrier to use the limited-entry route rights that are included in US Airways' authority by virtue of the blanket statement of authorization granted here, but that are not then being used by US Airways, the holding of such authority will not be considered as providing any preference for US Airways in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

(f) The authority granted here is specifically conditioned so that neither US Airways nor bmi shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions.⁶

On the basis of data officially noticeable under Rule 24(g) of the Department's regulations, we found the carriers qualified to provide the exemption services authorized.

Under authority assigned by the Department in its regulations, 14 CFR Part 385, we found that (1) our action was consistent with Department policy; (2) grant of the authority was consistent with the public interest; and (3) grant of the authority would not constitute a major regulatory action under the Energy, Policy and Conservation Act of 1975. To the extent not granted or deferred, we denied all requests in the referenced Docket. We may amend, modify, or revoke the authority granted in this Notice at any time without hearing at our discretion.

Persons entitled to petition the Department for review of the action set forth in this Notice under the Department's regulations, 14 CFR §385.30, may file their petitions within seven (7) days after the date of issuance of this Notice. This action was effective when taken, and the filing of a petition for review will not alter such effectiveness.

An electronic version of this document is available on the World Wide Web at:
http://dms.dot.gov/reports/reports_aviation.asp

⁵ The notice in paragraph (c) above can be used for this notification.

⁶ We note that the code-share arrangement as submitted did not include provisions regarding exclusive dealings between the code-share parties. Should the parties subsequently amend their code-share agreement or any other agreement affecting the code-share services to include a provision relating to an exclusive arrangement between the parties, that amended language must first be submitted for consideration by the Department.

Proposed Initial Routes

“US” code on flights operated by bmi

Manchester to

Aberdeen
Edinburgh
Glasgow
Toulouse

*Paris to

Leeds Bradford

“BD” code on flights operated by US Airways

Philadelphia to

Manchester
London (Gatwick)
Glasgow

Charlotte to

London (Gatwick)
Philadelphia
Newark

Philadelphia and Charlotte to

Boston
Ft. Myers (SW Florida Regional)
Pittsburgh
Raleigh/Durham
Cleveland
St. Louis
Baltimore
Kansas City

* With respect to the request for code-sharing on bmi’s flights between Paris (CDG) and Leeds/Bradford, U.K., the US Airways’ traffic to/from this U.K. destination via Paris will be carried on a blind-sector basis.

U.S. Carrier Exemption Conditions

In the conduct of the operations authorized, the U.S. carrier applicant(s) shall:

- (1) Hold at all times effective operating authority from the government of each country served;
- (2) Comply with applicable requirements concerning oversales contained in 14 CFR 250 (for scheduled operations, if authorized);
- (3) Comply with the requirements for reporting data contained in 14 CFR 241;
- (4) Comply with requirements for minimum insurance coverage, and for certifying that coverage to the Department, contained in 14 CFR 205;
- (5) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (6) Comply with all applicable requirements of the Federal Aviation Administration and with all applicable U.S. Government requirements concerning security, including, but not limited to, 49 CFR Part 1544. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) to or from a foreign airport, contact its International Principal Security Inspector (IPSI) to advise the IPSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served; and
- (7) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department of Transportation, with all applicable orders and regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

The authority granted shall be effective only during the period when the holder is in compliance with the conditions imposed above.

Foreign Carrier Exemption Conditions

In the conduct of the operations authorized, the foreign carrier applicant(s) shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36, and with all applicable U.S. Government requirements concerning security, including, but not limited to, 49 CFR Part 1546 or 1550, as applicable. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) from a foreign airport that would be the holder's last point of departure for the United States, contact its International Principal Security Inspector (IPSI) to advise the IPSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served;
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are: (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States. In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;
- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;
- (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
- (10) If charter operations are authorized, except as otherwise provided in the applicable aviation agreement, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
- (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code.